IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 120

ERNEST NEWTON KALB and
MARGARET KALB, his wife,

Appellants,

vs.

HENRY FEUERSTEIN and
HELEN FEUERSTEIN, his wife,

Respondents.

APPEAL FROM THE SUPREME COURT OF
THE STATE OF WISCONSIN

BRIEF OF THE RESPONDENTS

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STATEMENT

The appellants' statement of the case is inaccurate in certain details, both as to its nature and as to the facts. Consequently, we feel constrained to re-state briefly the nature of the case and the material facts alleged in the complaint.

This appeal arises out of an action in equity instituted in the Circuit Court of Walworth County, Wisconsin, by the above named appellants. The complaint prayed for judgment cancelling a deed executed by the sheriff of Walworth County pursuant to a judgment of fore-

closure and sale. The complaint further prayed that judgment be rendered removing the respondents from possession of certain premises described in the complaint and restoring possession of said premises to the appellants herein.

The material facts alleged in the complaint will be briefly stated herein.

Prior to March 7th, 1933, the appellants executed and delivered to the respondents, a note secured by a mortgage on certain real estate owned by the appellants (R. 1).

On March 7th, 1933, foreclosure of that mortgage was instituted in the County Court of Walworth County, Wisconsin, not in the Circuit Court as stated by appellants' counsel, and judgment of foreclosure and sale was rendered on April 21st, 1933 (R. 1).

The respondent, Ernest Newton Kalb, filed a petition under the original Frazier-Lemke Act in the District Court for the Eastern District of Wisconsin on October 2, 1934, which petition was dismissed on June 27th, 1935 (R. 2). On July 20th, 1935, sheriff's sale of the mortgaged premises was had pursuant to the judgment of foreclosure and sale previously rendered by the County Court of Walworth County (R. 2).

On September 6th, 1935, the petition of the respondent, Ernest Newton Kalb, was reinstated in the Federal Court under the second Frazier-Lemke Act (U.S.C.A. Title 11, Sec. 203) (R. 2).

Pursuant to notice the respondents applied to the County Court of Walworth county for confirmation of the sheriff's report of sale on September 9, 1935, and

on September 16th, 1935 an order confirming the sale was duly entered (R. 2, 3).

On December 16th, 1935, a writ of assistance was issued by the County Court of Walworth County, Wisconsin, and pursuant to that writ the respondents were put in possession of the mortgaged premises on March 12, 1936 (R. 3).

This action was instituted in September of 1937 (R. 4), in the Circuit Court of Walworth County, Wisconsin. The respondents, in that Court, demurred to the plaintiffs' complaint (R. 4) on the ground that it did not state facts sufficient to constitute a cause of action, and the demurrer was sustained by the trial court, (R. 5). An appeal was taken to the Supreme Court of the State of Wisconsin and the Circuit Court was affirmed. (R. 6). A motion for rehearing was denied.

Thereafter an appeal was taken to this Court, which appeal was dismissed because of lack of final judgment (59 S. Ct. Rep. 707). Subsequently such proceedings were had that final judgment was rendered in the Circuit Court for Walworth County, Wisconsin, dismissing the appellants' complaint, and an appeal therefrom was taken to the Supreme Court of Wisconsin (R. 13).

From the decision of the Supreme Court of Wisconsin sustaining the lower court, this appeal is taken (R. 14).

It is stated at Page 2 of the appellants' consolidated brief that this case involved the same question of law as Case No. 121 and the decision in this case must necessarily govern the decision in the other. While both arise out of the same set of facts different principles of law are involved and the decision in one case will by no means be binding in the other.

The instant case lies on the equity side of the court and must be decided in part upon equitable considerations, while the companion case sounds in tort.

For those reasons, separate briefs have been filed in both Cases No. 120 and No. 121.

QUESTIONS PRESENTED

Counsel for the appellants state that the only question presented by the record herein is "whether or not the provisions of subsections (n), (o), (p) and (s) of Section 203, Title 11, Bankruptcy, U. S. Code, as amended by Section 203, Title 11, Bankruptcy, Supplement 4, U.S. Code, are mandatory and self-executing."

We respectfully submit that, in addition to the question suggested by the appellants, the following questions are presented for consideration, to-wit:

First. Is the Federal question presented by this record sufficiently substantial to entitle the appellant to review by this Court?

Second. Can the orders of the County Court of Walworth County, Wisconsin, be collaterally attacked as attempted in this proceeding?

Third. Does the complaint affirmatively show laches on the part of the appellants?

Fourth. Does the filing of a petition under the Frazier-Lemke Act act as an automatic stay of all proceedings in the State Courts?

Fifth. When it appears, as it does in the complaint herein, that the petitioner under the Frazier-Lemke Act has made no effort to comply with the provisions of the Act, can he assert any rights under the Act or claim any of the benefits thereof?

SUMMARY OF ARGUMENT

I.

The Supreme Court of the State of Wisconsin having based its judgment upon non-Federal grounds which adequately support that judgment, the motion of the respondents to dismiss or affirm should be granted, even though a Federal question was discussed, and, as it is claimed, erroneously decided.

II.

A demurrer admits only those facts that are well pleaded and does not admit conclusions of law.

III.

(a) This action is a collateral attack upon the orders and judgment of one court by a court having equal and concurrent, but no appellate jurisdiction.

The County Court of Walworth County, having been granted jurisdiction, by statute, of mortgage foreclosures, had the power to determine whether or not it retained jurisdiction after the filing of a petition under the Frazier-Lemke Act. Even if the decision of the court were erroneous, subsequent orders were merely voidable, not void.

(b) The settled law in Wisconsin is to the effect that where a court has acquired jurisdiction, any judgment rendered in the exercise of that jurisdiction, even if clearly erroneous, can only be tested by appeal.

(c) Failure to appeal from the orders of the County Court of Walworth County is a bar to the maintenance of this action.

(d) Counsel for the appellant has failed to distinguish between judgments and orders that are void

for a total want of jurisdiction, and those that are merely voidable because they were entered in excess of jurisdiction.

IV.

(a) A complaint in equity which shows on its face that the plaintiff is guilty of laches may be restricted by demurrer.

(b) The complaint is demurrable because it shows on its face that the appellants have been guilty of culpable negligence in failing to object to the jurisdiction asserted by the County Court of Walworth County and in failing to appeal to the proper appellate tribunal.

(c) The complaint is demurrable because of the failure of the appellant to make timely application for equitable relief. The complaint is silent as to any justification or excuse for the unwarranted and unreasonable delay in bringing this action.

V.

The filing of the amended petition, under Section 75 of the Bankruptcy Act, on September 6, 1935, did not effect an automatic stay of the foreclosure proceedings pending in the state court but at most subjected the farmer and all of his property *not in the custody or control of some other court,* to the exclusive control of the Bankruptcy Court. To hold that the mere filing of the petition, without obtaining a judicial stay, operated as an automatic stay of pending proceedings in the State Court would result in an inextricable confusion with respect to real estate titles. The language of Subsection N is an assertion of jurisdiction which, if properly made to appear, would be the basis for a judicial stay. Such has always been the rule with reference to the Bankruptcy Act.

VI.

The cases cited by the appellants are merely in support of a proposition that the Federal Court may, by injunction, either summarily or upon notice, restrain a state court from exercising jurisdiction after the filing of the petition in the Federal Court. That question is not involved in this case and the cases cited by the appellants do not support appellants' position that the statute in question is self-executing.

VII.

The complaint is demurrable for it shows an entire absence of good faith on the part of the appellants and fails to show that appellants took any steps to comply with the provisions of Section 75 during the period prior to the dismissal of the original petition and during the two years which elapsed between the filing of the amended petition and the commencement of this suit. They must be deemed to have abandoned the proceedings in Federal Court and to have waived their rights for the act cannot be converted into a sham for the purpose of gaining a procedural delay and hindering creditors.

ARGUMENT

I.

THE DECISION IN THE STATE COURT HAVING BEEN BASED UPON NON-FEDERAL GROUNDS, REVIEW MAY NOT BE HAD IN THIS COURT AND THE RESPONDENTS' MOTION TO DISMISS OR AFFIRM SHOULD BE GRANTED

In accordance with the rules of this Court, motion was made by the respondents herein to dismiss the appeal

or to affirm the lower Court on the ground that no substantial Federal question was presented.

On October 9th, 1939, this Court ordered that "further consideration of the question of the jurisdiction of this Court and of the motions to dismiss or affirm is postponed to the hearing of the cases on the merits."

Those matters which we consider purely non-Federal grounds are thoroughly discussed in that portion of our brief relating to the issues raised by the pleading and are not restated here except by reference.

The Supreme Court of the State of Wisconsin did not write an opinion in this case, either on the appeal (R. 7) or on the motion for rehearing (R. 8) stating that this case was controlled by the decision in the companion case of *Ernest Newton Kalb v. Roscoe R. Luce, et al.* (This court No. 121, Oct. Term, 1939) officially reported as *Kalb v. Luce, et al,* 228 Wis. 519, 279 N.W. 685. The ruling on the motion for rehearing is officially reported as *Kalb v. Luce,* 228 Wis. 521, 280 N.W. 725.

The opinion of the State Court on the appeal and on the motion for rehearing are, for the convenience of this Court, attached to this brief as Appendices II and III.

While the Supreme Court of the State of Wisconsin in its original decision discussed the application of the Frazier-Lemke Act, as amended, to mortgage foreclosures in Wisconsin courts (Appendix II), it nevertheless held upon non-Federal grounds that the complaint did not state a cause of action against the defendant, O'Brien (Sheriff). But upon the appellants' motion for rehearing the Wisconsin Supreme Court eliminated the Federal question entirely (Appendix III), and decided the case

upon other and non-Federal grounds. Mr. Chief Justice Rosenberry, speaking for the Court, said:

> "All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth county had jurisdiction to make the determination. If it should hold that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one should know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.
>
> We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void."

Counsel for the respondent respectfully submit that the only conclusion that can be drawn from the language above set forth, is that the judgment and orders of the County Court, even though erroneous, were within the power of that court to make and could only be questioned by appeal to the proper appellate tribunal, and that the Supreme Court of Wisconsin ruled against the appellant on that ground.

We have fully discussed the question of collateral attack elsewhere in our brief (see pages 19 to 27 inclusive) and will not repeat our argument here. Sufficeth to say that as an elementary proposition, a judgment entered by a court having jurisdiction of cases of the kind and class of that adjudged, cannot be collaterally attacked.

The rule is well established that where the decision of the State Court is deemed to rest upon a non-Federal ground which independently and adequately supports the State Court judgment, the United States Supreme Court will not exercise jurisdiction to review, notwithstanding the raising of Federal questions upon the State Court record or the decision of those questions by the State Court. Where such an independent and adequate non-Federal ground of decision appears, review may not be had in the Supreme Court even though the State Court *also in terms purports to decide a federal question, and decides it erroneously.*

Applying the above rule to the case at bar, it seems clear to us that even though the Supreme Court of Wisconsin discussed the application and validity of the Frazier-Lemke Act, still the case is not entitled to review by this tribunal for the reason that there are ample non-Federal grounds upon which the judgment of the State Court may, and in fact must, be sustained.

Even though all of the contentions of the appellant with regard to the Frazier-Lemke Act be sustained, the remanding of the case to the State Court for further proceedings would be useless and profitless, for the State Court could thereafter enter the same judgment upon the non-Federal grounds alone.

The questions of collateral attack and of laches are both purely non-Federal questions and are not proper matters for review by this Honorable Court. And this is true even though the State Court discussed, and as it is claimed erroneously decided a question relating to a Federal statute.

In the case of *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157, 164; 37 S. Ct. 318; 61 L. Ed. 644, the State Court decided in favor of the respondent upon two grounds, first, that the 14th amendment relating to "due process and equal protection" had not been violated; and second, that the defense of estoppel in pais was well grounded.

This Court said:

> "The first was plainly a Federal question and the other was plainly non-Federal. Both were resolved in favor of the Canal Company * * * Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. *In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it.* (Italics ours)

To the same effect are the following cases: *Hammond v. Johnson,* 142 U.S. 73; 35 L. Ed. 941; 12 S. Ct. 141. *Eustis v. Bolles,* 150 U.S. 361; 37 L. Ed. 1111; 14 S. Ct. 131.

It seems to us obvious from the whole record that the State Court reached its ultimate conclusions upon the principal ground that the orders of the County Court could not be attacked collaterally.

In any event it is clear from the record that the State Court could and doubtless would, if the case were remanded, rule against the appellant on that and other non-Federal grounds. Sufficient reasons therefor exist for either dismissal or affirmance by this Court.

In *Murdock v. Memphis,* 20 Wall. 590, 634, 635; 22 L. Ed. 429, this Court said:

> "But when we find that the State Court has decided the question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record so as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal; or on the other hand, whether there exist other matters in the record actually decided by the State Court which are sufficient to maintain the judgment of that Court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the State Court."

In view of the fact that the record establishes ample non-Federal grounds upon which the State Court could and did decide the case adversely to the appellants, respondents' motion to dismiss or affirm, should we respectfully submit, be granted.

II.

DEMURRER ADMITS ONLY FACTS WELL PLEADED

Throughout the various causes of action, appear such language as "arbitrarily, wrongfully and unlawfully," and "while the exclusive jurisdiction of the person of the

plaintiff and of all of his property, both real and personal, was in the United States District Court," and "the acts * * * were done and performed in collusion."

This language and these allegations are but conclusions of law, are not well pleaded, and are not admitted by demurrer.

Aaron v. Wausau, 98 Wis. 595.
Coughlin v. Milwaukee, 227 Wis. 357.
49 *C. J.* 438.

III.

A JUDGMENT RENDERED BY ANY COURT WITHIN ITS JURISDICTIONAL SCOPE CANNOT BE ATTACKED IN A COLLATERAL PROCEEDINGS

(a) These Proceedings Are In Effect a Collateral Attack Upon the Orders Issued by the County Court of Walworth County and Cannot be Maintained.

The County Court of Walworth County, by virtue of the legislative enactment which created it, has concurrent jurisdiction within prescribed limits with the Circuit Court of Walworth County, wherein these proceedings were instituted (See Appendix I).

Among those matters in regard to which the County Court has concurrent jurisdiction with the Circuit Court, are the foreclosures of real estate mortgages and all proceedings in reference thereto.

As appears by the complaint herein, the County Court acquired jurisdiction of the person of the defendant and the real estate in question by the institution of foreclosure

proceedings which in due course matured in a judgment of foreclosure on April 21, 1933. Pursuant to that judgment sale was had on July 20, 1935. These were matters properly within the jurisdiction of the County Court, and up to that point no conflict or question of jurisdiction had arisen. Following the sale and prior to the confirmation appellants' petition in the Federal Court was reinstated. Upon the application for confirmation the County Court was authorized under long established rules of law, and in fact required to determine whether the jurisdiction of that court was completely terminated. The Judge thereof, in the exercise of his judicial duty, decided that the County Court could retain jurisdiction and granted the order prayed for.

The appellants herein now institute an action in the Circuit Court of Walworth County, a court having equal, but no greater jurisdiction, and no appellate jurisdiction over the County Court, collaterally attacking the order issued by the County Court.

It is clear that in order for the respondent to maintain his action and prevail in his appeal, the Circuit Court must find the orders referred to were utterly void.

We respectfully submit that even if that Court were to hold that the Judge of the County Court acted in excess of his jurisdiction, the orders complained of are erroneous and voidable, not void. No appeal having been taken within the statutory period, the orders complained of are and must be free from collateral attack.

It is said in *Vol. 1, Freeman on Judgments,* P. 718-719, that:

> "If the circumstances which give rise to the jurisdiction do not exist in a particular case the authority to act does not arise. But the question as to whether

> or not they do in fact exist is a matter primarily for the court whose powers are invoked, and it has jurisdiction to examine and determine whether the particular application is within or beyond its authority. Its decision in this respect is itself the exercise of a power conferred by the pleading or other act invoking its jurisdiction, and if such decision is incorrect, whether because of lack of evidence or for any other reason, it is none the less binding upon the parties *unless and until set aside on appeal or by some other proceeding for that purpose. For jurisdiction to decide includes power to decide erroneously and to make the decision bind collaterally.*" (Italics ours)

The question as to whether or not a judgment rendered by a Court upon matters within its jurisdictional scope is subject to collateral attack has been frequently considered by this Honorable Court.

In *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. P. 646, the Court observed that a distinction must be observed between "excess of jurisdiction" and the "clear absence of all jurisdiction" over the subject matter of the controversy.

Mr. Justice Field said:

> "Where jurisdiction over the subject matter is invested by law in the judge or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend."

The court, by way of illustration pointed out that if a court having only probate powers were to issue a warrant for a criminal offense, it would be acting entirely without jurisdiction and would be liable to respond in

damages for the exercise of a usurped authority. But that on the other hand if a judge of a criminal court were to proceed to the arrest of a defendant for the commission of a crime committed outside of his district, no liability would fall upon him for such an Act, although it was clearly in excess of his jurisdiction.

It is contended in this case that the County Court erred in holding that it had jurisdiction after the filing of the petition in the Federal Court.

A case squarely in point and supporting our contention that the orders of the County Court cannot be collaterally attacked is *Dowell v. Applegate*, 152 U.S. 327; 14 Sup. Court, Rep. 611, 38 L. Ed. 463. Therein a judgment had been rendered in a District Court. The judgment was collaterally attacked on the ground that no diversity of citizenship existed and was vacated by the Supreme Court of the State of Oregon.

On appeal to the Supreme Court of the United States, Mr. Justice Harlan said:

> "It is claimed that the ground on which the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. *Its determination of it was the exercise of jurisdiction,* its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or *either of them collaterally,* or otherwise *than on writ of error or appeal* to this court." (Italics ours)

The cited case presents precisely the same situation as the case now before the Court. Even if it be found that the County Court of Walworth County erred in the exer-

cise of its jurisdiction, yet its determination of that question was conclusive upon the appellant herein and could only be questioned by appeal therefrom.

(b) The Settled Adjudications of the Supreme Court of the State of Wisconsin are in Strict Conformity with the Position Taken by the Respondents on the Question as to Whether or not the Orders in Question may be Collaterally Attacked.

The law is also well settled in Wisconsin that an order or judgment issued or entered by any Court in excess of its jurisdiction is voidable, not void, and cannot be attacked except by appellate proceedings in a court having appellate jurisdiction.

A case arising out of a plexus of facts strikingly similar to the matter now before the Court is *Johnson v. Brewers Fire Ins. Co.*, 51 Wis. 570; 8 N.W. 297, in which a Michigan Court, although all of the necessary papers in the form required by law had been duly filed for that purpose, refused to remove a cause to the District Court where a diversity of citizenship clearly existed. The defendant refused to proceed further, a default judgment was rendered against him by the Michigan Court and sued on in Wisconsin. On the trial in Wisconsin, the defendant contended that the Michigan judgment was absolutely void on the theory that it had been rendered after that court had been completely divested of any jurisdiction over the cause.

The Court held that the Michigan judgment was voidable only and could not be attacked in a collateral proceedings:

> "Mere error in the proceedings of the state court cannot be corrected by this court, or received

here, for the obvious reason that we have no revisory power over that court * * * We hold that when the case is within the Act of Congress and an application in proper form for its removal is made, it is the duty of the state court to accept the petition and bond, and proceed no further in the suit. This is the mandate of the statute. But if the state court declines to relinquish its jurisdiction and proceeds to judgment such judgment is not void, but merely erroneous. Until it is reversed or set aside in a proper manner by an appellate court, it is valid and must be respected; certainly in a collateral proceeding."

The general rules established by the foregoing decision have been followed and affirmed from time to time by the Supreme Court of the State of Wisconsin.

The clean-cut but often misunderstood distinction between an absolute want of jurisdiction and an act in excess of jurisdiction has been fully preserved. The former applies to an act of judgment performed in a matter where the court or judge so acting has absolutely no jurisdiction over the proceedings or the parties before him, and under no set of facts would have the power to act. The latter applies to an act or judgment done by a judge or a court in connection with a cause of action, the subject matter of which falls within that class and kind of cases, the jurisdiction of which is vested in that particular court.

Approval of and extensive elaboration of those rules of law will be found in *State ex rel Fowler v. Circuit Court*, 98 Wis. 143, 73 N.W. 788; *Comstock v. Boyle*, 134 Wis. 613, 114 N.W. 1110; *In re Clark*, 135 Wis. 437, 115 N.W. 387; *Harrigan v. Gilchrist*, 121 Wis. 127, 99 N.W. 909, and *in re Rice's Will*, 150 Wis. 401, 136 N.W. 956, where a court of probate attempted to exercise civil jurisdiction.

The Court held in the last cited case that whether a judgment is jurisdictionally bad for judicial error instead of for excess of power, turns on whether the court had jurisdiction of such subjects as the one deliberated upon. So that when, as in this case, a judge situated as was the respondent, Luce, has acquired full jurisdiction of the cause, any judgment rendered in the exercise of that jurisdiction, even if clearly erroneous, can only be tested by appeal. This is true even though the error was committed as is claimed here, by retaining jurisdiction after jurisdiction had been acquired by another tribunal.

It is not for this Court to decide in passing upon this phase of the case, whether the District Court acquired jurisdiction upon the reinstatement of the appellants' petition. It is rather for this Court to decide whether the County Court of Walworth County had jurisdiction of the person of the respondents and the subject matter of the action prior to the time of reinstatement of the petition.

We respectfully submit that it is clear from the face of the complaint that the County Court had such jurisdiction, and if that Court erred in determining whether it had or had not lost jurisdiction it was mere error, assailable only by appeal.

(c) The Complaint Affirmatively Demonstrates a Failure to Pursue the Proper Remedy.

It is axiomatic that any person who claims to have certain legal rights must avail himself of those rights promptly, and without delay move for their exoneration.

The appellants allege in their complaint that the County Court of Walworth County erroneously exercised its jurisdiction in confirming the sheriff's sale in a mort-

gage foreclosure in which they were defendants and in placing the purchaser at the sheriff's sale in possession under a writ of assistance.

The appellants admit by allegations in their complaint that notice of the proceedings complained of were duly served upon them and that they had due notice of the pendency and maintenance of such proceedings. Both the order confirming the same and the order granting the writ of assistance were appealable orders.

If the appellants felt that they had been aggrieved by either of those orders, or that the orders were issued without authority, or contrary to law, it was their right and their duty to appeal therefrom to the Supreme Court of the State of Wisconsin within the time fixed by the Statutes of that State.

On September 16, 1935, and on December 16, 1935, the day on which the order confirming the sale was entered, the time within which an appeal must be taken was limited to one year by Section 274.01 of the Wisconsin Statutes of 1935, the pertinent portion of which reads as follows:

> "The time within which a writ of error may be issued or an appeal taken to obtain a review by the Supreme Court of any judgment or order in any civil action or special proceeding in a court of record is limited to one year from the date of entry of such judgment or order * * *."

The complaint in this case is barren of any allegation that such an appeal was taken.

Or, if the appellants believed, as they allege in their complaint, that the exclusive jurisdiction of the appellants' property, real and personal, was vested in the United States District Court for the Eastern District of

Wisconsin, or that the jurisdiction of the State Court previously acquired had been terminated or superseded by the Federal Court, the burden rested upon them to assert those rights promptly and expeditiously. Upon them was the burden to make due application to the Federal Court for a judicial stay enjoining the State Court from exercising any further jurisdiction.

Instead of so doing, it affirmatively appears that the appellants, with full knowledge that an application for confirmation of sale had been made, with full knowledge that application for a writ of assistance had been made, and in spite of the fact that possession of the real estate in question had been delivered to the purchaser on March 12, 1936, stood idly by and in no wise questioned the jurisdiction of the State Court until they instituted this suit in September, 1937, approximately two years after the issuance of the order confirming the sheriff's sale.

Despite the fact that three courses were open to them, to-wit: first, an appeal from the order of the State Court; second, an application for a stay of proceedings in the State Court, and third, an application for a stay of proceedings in the Federal Court, none of these were pursued and the complaint affirmatively demonstrates these facts.

We respectfully submit that the complaint is demurrable for these reasons, if for no other.

(d) Counsel for the Appellants Fails to Distinguish Between Judgments and Orders That are Void and Those That are Merely Voidable.

At pages 22 and 23 of appellants' brief authorities are therein cited in support of the appellants' position

that the acts of the County Court were utterly void. The authorities cited merely hold that where a court has jurisdiction of the person or subject matter before him, and acts in a matter of a kind and class over which that court cannot entertain jurisdiction, the resulting judgment is void.

For example in *Mitchell v. St. Maxent*, 71 U.S. 237, 18 L. Ed. 327, an execution had been issued after the death of the judgment debtor, in clear violation of the express language of the state statute requiring substitution of the parties defendant. It would require no extended argument to demonstrate that the Court was clearly acting without jurisdiction, there being no facts or circumstances under which the court could properly exercise jurisdiction.

And in *Gaines v. New Orleans*, 73 U.S. 642, 18 L. Ed. 951, also cited by the appellant, an executor sold lands after his authority so to do had expired under the laws of the State of Louisiana. This court held that the sale was void, and rightfully so as, under no theory, could the court have entertained jurisdiction after the expiration of the statutory period.

But we do not find in the appellants' brief any cases holding that where a court has acquired jurisdiction, it is deprived of the power to adjudicate and determine whether or not that jurisdiction has been terminated by the intervention of some other circumstance, for, as is stated in *Wilcons v. Penn Mutual Life Insurance Company*, 91 Fed. 417, cited at pages 21 and 22 of the appellants' brief, the "jurisdiction is the power to decide wrongfully as well as rightly."

IV.

THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION FOR EQUITABLE RELIEF

(a) An Insufficient Complaint in Equity May be Reached by Demurrer.

This action was instituted by the appellants in equity praying for cancellation of a sheriff's deed. The law is well established that when the complaint affirmatively demonstrates on its face that the plaintiff has been guilty of laches, the defendant may resist it by demurrer.

Speidel v. Henrici, 120 U.S. 377, 30 L. Ed. 718, 7 S. Ct. 610.

19 Am. Jur., P. 221, Par. 309.

(b) The Complaint Affirmatively Demonstrates on its Face That the Appellants Have Been Guilty of Laches by Failing to Present Their Defense or to Appeal from the Judgment of the County Court for Walworth County.

This action was instituted by the plaintiffs in the Circuit Court for Walworth County, Wisconsin, asking for relief in equity, to-wit: the cancellation of a sheriff's deed and for the restoration of possession of certain real estate.

The allegations of the complaint affirmatively show that on September 16, 1935, in an action for foreclosure of a mortgage in which these appellants were defendants, an order was entered confirming the sheriff's report of sale (R. 23). The complaint further shows that on December 16, 1935, an order for a writ of assistance was issued by that Court and pursuant to that order the

appellants were removed from the premises in question, and the respondents placed in possession on March 12, 1936 (R. 3).

This action was commenced by the service of a summons and complaint on September 10, 1937, nearly two years after the order complained of, and approximately eighteen months after the appellants were removed from the premises described in the plaintiffs' complaint herein. The complaint is barren of any allegations justifying, explaining or excusing appellants' delay in the commencement of this action, or their failure to oppose the granting of the orders complained of.

It is a long and firmly established rule of law that he who seeks equitable relief must exercise reasonable diligence in seeking redress. Nor will a court of equity relieve a man from his own culpable negligence.

In *1 Eq., Juris,* Par. 381, Judge Story states in part as follows:

> "If a court of equity is asked to give relief in a case not fully remediable at law, or not remediable at all at law, then it grants it upon its own terms and according to its own doctrines. It gives relief only to the vigilant and not to the negligent; to those who have not been put upon their diligence to make inquiry, and not to those who, being put upon inquiry, have chosen to omit all inquiry, which would have enabled them at once to correct the mistake, or to obviate all ill effects therefrom. *In short, it refuses all its aid to those who, by their own negligence, and by that alone, have incurred the loss, or may suffer the inconvenience.*" (Italics ours)

This general rule has been frequently applied by this Honorable Court. In *Cragin v. Lowell,* 109 U.S. 194, 3 Sup. Ct. Rep. 132, 27 L. Ed. 903, where an action was

brought in equity to set aside a judgment on the ground that the residence of the parties had been falsely stated, so as to bring the matter before the Federal Court, the Court said:

> "It is quite clear that the bill in equity was rightfully dismissed, because it contains no allegation that Cragin did not know, before the judgment against him in the suit at law, that the plaintiff in that suit alleged that he was a citizen of Louisiana. If he did then know it, he should have appeared and pleaded in abatement; and equity will not relieve him from the consequence of his own negligence."

In *Creath's Adm. v. Sims,* 5 How. 192, 12 L. Ed. 111, Mr. Justice Daniel said:

> "A court of equity will never be called into activity to remedy the consequences of laches or neglect, or the want of reasonable diligence. Whenever, therefore, a competent remedy or defense shall have existed at law, the party who may have neglected to use it will never be permitted here to supply the omission, to the encouragement of useless and expensive litigation, and perhaps to the subversion of justice."

And in *Kibbe v. Benson,* 17 Wall. 624, 21 L. Ed. 741, it was stated that:

> "If the party seeking in equity to set aside a judgment, could have defended the suit, but allowed judgment to go by his own neglect, he cannot have relief in equity for a matter which he might have availed himself of at law."

The obvious application of the rules expounded by the cited cases is clearly apparent. The jurisdictional matters alleged as a basis for the maintenance of this action were available to the appellants as a defense to the proceedings complained of in the County Court of

Walworth County. It was appellants' duty to assert them seasonably and to appeal from any ruling adverse to them.

The complaint shows on its face that the appellants failed to do either and hence we submit the complaint is demurrable.

(c) The Complaint is Also Demurrable Because of Appellants' Delay in Instituting This Action After he Became Aware of the Existence of the Facts Complained of.

It is a well established rule of law that he who seeks the aid of a court of equity must make timely application therefore. No specific rule has ever been laid down as to what period of time must elapse in order to bar the party seeking relief.

Walloch v. Washkowiak, 189 Wis. 491, 207 N.W. 286, was a case where the plaintiff sought rescission of a contract for exchange of a farm for town property on the ground of fraud. The lower court found there had been actionable fraud and rendered judgment for rescission. The action for rescission was commenced sixteen months after the fraud was discovered. Upon appeal, the lower court was reversed upon the ground that the plaintiff was guilty of laches in instituting the suit in equity.

The Court said:

> "When a party to such a transaction has had brought home to him the fact that the party in whom he placed trust and confidence, and upon whose statements he relied, has proved false to such trust and unworthy of relief in material matters, then there springs into existence the duty on the part of

a person so learning of such breach to act promptly if he desires assistance from a court of equity to place him in the position he was in prior to the alleged fraud. A delay in acting promptly upon such discovery forecloses him from the equitable remedy of rescission which is conditional upon prompt diligence on the part of a defrauded person. It is not intended that one may close his eyes as to certain material information brought home to him as to a fraud and breach of confidence, and then claim the right to long afterwards open them as to such prior disclosed facts, and subsequent discovery of other details of a fraud which, if perpetrated at all, was at the time of the original transaction and then, at such later discovery and time, elect to rescind for such fraud."

Also in *Schulteis v. Trade Press Pub. Co.*, 191 Wis. 164, 210 N.W. 419, the plaintiff asked equitable relief from a judgment alleged to have been obtained by fraud and upon perjured testimony. The action was instituted eleven months after the alleged perjury became known to the plaintiff.

The Court held:

"The rule is well settled that the fact that a judgment is obtained by perjury is sufficient ground for equitable relief. But it is equally well settled that such relief will not be granted to one who is guilty of inexcusable neglect in asserting his right to such relief. Plaintiff's delay of approximately eleven months after personal service of process upon him, without the suggestion of any excuse for such delay, warranted, the court in finding plaintiff guilty of such inexcusable neglect as to bar his right to equitable relief."

We respectfully submit that the rules set forth in the cases cited are applicable here.

The complaint being silent as to any justification or excuse for the unreasonable and unwarranted delay in bringing the action, the demurrer interposed is good and ought to be sustained.

V.

THE FILING OF THE AMENDED PETITION UNDER SECTION 75 OF THE BANKRUPTCY ACT DID NOT EFFECT AN AUTOMATIC STAY OF PROCEEDINGS THEN PENDING IN THE STATE COURT

It is contended by the appellants that the mere filing of a petition in the Federal Court automatically stayed all proceedings then pending in the State Court. We are not unmindful of the fact that some of the Federal Circuits have so held. In others it has been held that the proceedings in the State Court are stayed only when the proper order is issued in the Federal Court. Some circuits have held that such an order can be issued summarily. *In re Price*, 16 Fed. Supp. 836. This Court has not passed upon the question.

It is our contention that Section 75 (Title 11, U.S. C.A. Sec. 203) provides for a judicial stay when the proper facts are made to appear and that the filing of the petition does not automatically stay proceedings already instituted and pending in the State Court.

We respectfully submit that Section 75 is a part of the general Bankruptcy Act and that its provisions must be construed in the light of established principles and adjudications laid down by the courts in the past.

Counsel is not unmindful of that portion of Subsection N of Section 75 (Title 11, U.S.C.A. Sec. 203-N) of the Bankruptcy Act which reads as follows:

> "The filing of a petition shall immediately subject the farmer and all his property, wherever located, for the purpose of this section to the exclusive jurisdiction of the Court. * * * "

But from a reading of the entire section it is clear that it was not intended that the mere filing of a petition would act as a stay of proceedings then pending in a State Court.

Subsection S(2) Section 75 provides as follows:

> "When the conditions set forth in this section have been complied with, the Court shall stay all judicial or official proceedings in any court for a period of three years."

Had Congress intended that the Bankruptcy Court was to be vested with exclusive jurisdiction upon the mere filing of a petition, and that such filing amounted to a stay of all other proceedings instanter and without any other affirmative action, no reason would exist for a stay at a subsequent stage in the proceedings.

It has been stated in dealing with the bankruptcy law that the filing of a petition in bankruptcy operates to invest the bankruptcy court with exclusive jurisdiction over controversies relating to property in the possession of the bankrupt at the time of bankruptcy of which he claims the ownership. *Ex parte Baldwin,* 291 U.S. 610, 78 L. Ed. 1020, 54 S. Ct. 551, 6 Am. Jur. P. 531, Par. 25. Yet this seemingly decisive language has been modified by later decisions of this Honorable Court:

> "The doctrine has been limited by later decisions of the Supreme Court (U.S.) in which it is adjudged

applicable only to parties who have no substantial claim of lien upon, or title to, the property of the bankrupt and not to those who have such claims of existing liens or titles when the petition in bankruptcy is filed. In reality, the filing is neither a caveat nor an attachment; it creates no lien. It may, perhaps, better be said that the filing of the petition *is an assertion of jurisdiction with a view to the* determination of the status of the bankrupt and a settlement and distribution of his estate. Actual possession by the bankruptcy court is an indispensable condition of its exclusive jurisdiction." (Italics ours). Vol. 6, *Am. Jur.* P. 532.

To the same effect is *Straton v. New*, 283 U.S. 318, 75 L. Ed. 1060, 51 S. Ct. 465 in which Mr. Justice Roberts said:

"The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate."

And in *6 Am. Jur.* at P. 535 it is said:

"Bankruptcy proceedings do not, merely by virtue of their maintenance, terminate an action already pending in a State Court, to which the bankrupt is a party, or deprive the Court of jurisdiction in such case especially where the Court of jurisdiction of both the subject matter and the parties has been acquired by the State Court before the filing of the petition in bankruptcy."

It is clear therefore, that the term "exclusive" as it has been applied in the administration of the bankruptcy law, has not been construed as divesting the State Court of jurisdiction acquired prior to the filing of the petition in bankruptcy but only as an assertion of jurisdiction.

That this is the true intent of Section 75 we submit, is further demonstrated by the last sentence of Subsection N of that Section, which reads as follows:

> "In proceedings under this section, except as otherwise provided herein, the jurisdiction and powers of the courts, the title, powers and duties of its officers, the duties of the farmer, and the rights and liabilities of creditors, and of all persons with respect to the property of the farmer and the jurisdiction of the appellate courts, shall be the same as if a voluntary petition for adjudication had been filed and a decree of adjudication had been entered on the day when the farmer's petition, asking to be adjudged a bankrupt, was filed with the clerk of court or left with the conciliation commissioner for the purpose of forwarding same to the clerk of of court."

There are urgent reasons why a bankrupt desiring a stay of proceedings in the State Court should be required to ask for and obtain a stay in either the Federal or State Court. No judicial problem is more vexatious, nor more difficult of discernment than questions of jurisdiction particularly between the State and Federal Courts. Does not the orderly administration of justice require that before a State Court is ousted of jurisdiction by a Federal Court or vice-versa, that a magistrate make and enter an order to that effect and cause it to be served upon all interested persons?

Property rights and titles to lands are invariably involved in proceedings under the Bankruptcy Act. If State Courts are automatically divested of jurisdiction by the mere filing of a petition in bankruptcy, uncertainty and confusion must inevitably follow.

In this connection Mr. Chief Justice Rosenberry, speaking for the Supreme Court of the State of Wisconsin (See Appendix II) said:

"It may be conceded that the filing of the petition in the federal court created certain rights which the plaintiff in this action might have asserted either in the federal court or in the state court. However, the plaintiff failed to assert such rights either in the federal or state court as has already been stated. All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth County had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid of void until a search had been made of the records of the federal courts.

We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of sec. 75 as amended that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void.

We adhere to our former determination that the provisions of sec. 75 were not intended to provide

for a statutory stay but to create rights when properly asserted are grounds for a judicial stay." (Fols. 39-73).

(Note: The words "circuit court" in the last sentence are obviously in error. The order referred to by Chief Justice Rosenberry was issued by the County Court of Walworth County, a court having concurrent powers with the Circuit Court.)

We submit that a study of the entire Act at most, leads to the construction that the filing of the petition subjects the farmer and all his property not in the custody and control of some other Court, to the exclusive jurisdiction of the Bankruptcy Court.

VI.

THE CASES CITED BY THE APPELLANTS IN SUPPORT OF THEIR CONTENTION THAT SECTION 203 IS SELF-EXECUTING DO NOT APPLY

At pages 10, 11 and 13 of the appellants' brief, there will be found a number of United States Supreme Court decisions in support of appellants' contention that the statute in question is self-executing, and in support of that contention assert that the adjudications relating to the general bankruptcy law must control. It is true, as we pointed out elsewhere in our brief, that the Supreme Court of the United States has always held that Bankruptcy Courts have exclusive jurisdiction of the property of the bankrupt from the time of filing the petition.

We are also familiar with the rule oft-times repeated, that "the filing of the petition is a caveat to all the world and in fact an attachment and an injunction".

But that case and the other cases cited by the appellants are *in support of the proposition that the Federal Court may, by injunction either summarily or upon notice, restrain a state court from exercising jurisdiction after the filing of the petition in the federal court.* In the case of *May v. Henderson,* 268 U.S. 111, 69 L.Ed. 870, this court said:

> "In consequence any person acquiring an interest in property of the bankrupt after the filing of a petition with notice of it, may be directed to surrender the property thus acquired by summary order of the bankruptcy court."

And in *Isaacs v. Hobbs Tie & Timber Co.,* 282 U.S. 734, 75 L.Ed. 645, the Court after repeating the "exclusive jurisdiction" rule and that exercise of that jurisdiction forbids interference by state courts, also said "as mortgaged property ordinarily lies within the district in which the bankruptcy court sits, and the mortgagee can consequently be served with its process, the procedure usually followed is for that court to restrain the institution of foreclosure proceedings in any other. Where the land lies outside the limits of the district in which the bankruptcy court sits, ancillary proceedings may be instituted in the District Court of the United States for the district in which the land is, and an injunction against foreclosure issued by the court of ancillary jurisdiction."

And in *Gross v. Irving Trust Company,* 289 U.S. 342, 77 L.Ed. 1243, cited at page 10 of the appellants' brief, in a case involving the question of whether or not a state court had the power to fix compensation of state receivers and their counsel after bankruptcy in the Federal Court had intervened, this Court held that bankruptcy courts have exclusive jurisdiction and that its possession

and control cannot be affected by other proceedings, but the court further said:

> "Nevertheless, due regard for comity, which means, in this connection, no more than judicial courtesy between the courts undertaking to deal with the same matter—would suggest that ordinarily the trustee in bankruptcy might well be instructed by the bankruptcy court, before taking final action, to request the state court to recognize the exclusive jurisdiction of the former and set aside any orders already made conflicting therewith, as was done with good results in the case of Re Diamond, supra (C. C.A. 6th) 259 Fed. pp. 72, 75, 44 Am. Bankr. Rep. 268."

And in *Acme Harvester Company v. Beekman*, 222 U.S. 300, 56 L. Ed. 209, cited by appellants at page 13 of their brief, the question involved was whether or not the Federal Court had the power to restrain a state court from pursuing an action in debt instituted after the filing of a petition in bankruptcy. This court, in discussing the rule said:

> "The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate."

We respectfully submit therefore that the authorities cited by the appellants do not support their position and that the general rule in bankruptcy matters is that the filing of a petition in a bankruptcy court does not ordinarily and without notice suspend the power of all other courts to act, but merely is an assertion by the Federal Court of its jurisdiction, with a view to a determination of the status of the bankrupt and a settlement and distribution of his estate. The assertion of jurisdiction we contend, must be exercised by an injunctional order.

VII.

THE COMPLAINT AFFIRMATIVELY DISCLOSES A LACK OF GOOD FAITH ON THE PART OF THE APPELLANT OR A COMPLIANCE WITH THE PROVISIONS OF SECTION 75

The complaint alleges that the original petition was filed by the appellants in the District Court of the United States for the Eastern District of Wisconsin on the 2nd day of October, 1934. It was dismissed on June 27th, 1935, and subsequently was reinstated on the 6th day of September, 1935.

The complaint, however, is barren of any allegation that a plan of composition was submitted, or that it was accepted or denied, or any report submitted by the Commissioner. The complaint is likewise barren of any allegation that the appellants have been adjudicated as bankrupt in accordance with Section 75(s). (Title 11, U.S.C.A. 203-s)

Although nearly eighteen months elapsed from the date the original petition was filed before their possession of the real estate was disturbed, and nearly three years elapsed from the date of filing and the commencement of this action, the complaint shows that the appellants did nothing to comply with the terms of the Act. We submit, therefore, that they must be deemed to have abandoned the proceedings in the Federal Court and to have waived and surrendered any rights the filing of the petition may have invested in them.

The law in question, the Frazier-Lemke Act, was not enacted by the Congress of the United States for the mere purpose of providing a means by which a debtor

unwilling, or unable to meet his obligations could prevent his creditors from pursuing their legal remedies. It required the debtor to seasonably take a definite course of action to the end that one of two results should be reached, either a composition, or, if that was impossible, an adjudication in bankruptcy.

It is stated in *Vol. 8, C. J. S.*, P. 1750, Par. 808, that:

> "One seeking benefits provided by the Act, after initiating the procedure, must carry the burden of pursuing the various steps provided diligently, honestly, in good faith and without unnecessary delay."

The Federal Courts, in discussing Section 75, have uniformly held that:

> "The submission of an equitable, feasible and good-faith proposal of compromise or extension on the part of the debtor is a condition precedent to his right to proceed further under the provision of Section 75 of the Bankruptcy Act."
>
> *In re Alatalo*, 26 F. Supp. 276.

And in *Baxter v. Savings Bank of Utica*, N. Y. 92, Fed. (2nd) 404, the Court said:

> "A good-faith effort to compromise with creditors is a prerequisite to extension relief in agricultural composition proceedings."

To the same effect is the case of *Pearce v. Coller*, 92 Fed. (2nd) 237, where it was held that a farm debtor who did not comply with statutory requirements relative to composition and plan of extension, was not entitled to relief under the Act.

And in *re Henderson*, 100 Fed. (2nd) 820, it was said:

> "A proceeding for composition or extension of debts may not be converted into a sham for the pur-

pose of gaining whatever the debtor wishes by way of procedural delays and hindrances to creditors where no legitimate purpose of the act authorizing such proceedings will be served."

The complaint, it appears to us, affirmatively demonstrates a complete and absolute lack of "good faith" on the part of the appellants and the complaint is rendered demurrable for that reason, in addition to the other grounds relied upon by the appellants.

CONCLUSION

Counsel for the respondents respectfully submit that in view of the fact that the record shows that the Supreme Court of Wisconsin based its judgment upon a non-Federal ground broad enough to support that decision, the motion of the respondents to dismiss or affirm should be granted.

We further contend that the decision of the Supreme Court of Wisconsin should be affirmed for the following reasons:

First, because this action is a collateral attack upon the orders of a court of equal and concurrent jurisdiction.

Second, because the complaint affirmatively demonstrates that the appellant is guilty of laches.

Third, because the complaint affirmatively shows a lack of good faith in the prosecution of the appellants' petition in the Federal Court.

Respectfully submitted,

J. ARTHUR MORAN,
Delavan, Wisconsin,
Counsel for Respondents.

APPENDIX I

LAWS OF WISCONSIN, 1907.

No. 257, S. Published June 20, 1907.

CHAPTER 234.

AN ACT to confer civil and criminal jurisdiction on the county court for Walworth County.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Concurrent with circuit court for cases not over $25,000. SECTION 1. There is hereby conferred on the county court of Walworth county, jurisdiction in all civil actions and proceedings in law and in equity, concurrent with and equal with the jurisdiction of the circuit court in said county, for all claims, demands and sums and to and concerning all property, not exceeding the sum or value of twenty-five thousand dollars; provided, that said county court shall have jurisdiction in all actions in said county for the foreclosure of mortgages and mechanic liens, in which the amount claimed does not exceed the sum above mentioned, although the property to be affected by the judgment exceeds the sum of twenty-five thousand dollars in value; and of all actions for divorce or for affirmance or annulment of marriage contracts; and all actions for removing clouds and quieting title to real estate and all actions for partition of real estate; and in all bastardy actions and in all criminal cases except murder, manslaughter and homicide; and to the amount and within the limits aforesaid the said county court shall be a court of general jurisdiction, with the same power and jurisdiction in all civil and

criminal actions and proceedings, and including the power of review of records on certiorari, discharging mortgages of record, and such other special powers as are now or may hereafter be conferred by the statute upon the circuit court, coming within the above limitations, as belong to and are exercised by the circuit court in and for said county.

Writs and legal process. SECTION 4. The said county court, within the limits aforesaid, shall be a court of record, with a clerk and seal, and shall have full power and authority to issue all writs and legal process, proper and necessary to carry into effect the jurisdiction conferred by this act and the laws of this state, and to carry out such jurisdiction shall have and exercise all powers now possessed, or which may hereafter be possessed by the circuit courts of this state, and the same proceedings shall be had by the parties to procure such writs and process as in circuit courts and such writs and process shall be issued, executed and returned in the same manner and with like effect as in the circuit courts.

Execution: circuit court powers conferred. SECTION 8. All judgments, orders and decrees, made and entered in and by said county court, shall have the same force, effect and lien, and be executed and carried into effect and enforced, as judgments, orders and decrees, made and entered in the circuit court, and all the remedies given, and proceedings provided for the collection and enforcement of the judgments, orders and decrees of the circuit court, shall apply to and be exercised by and pertain to said county court.

Supreme court's review same as for circuit court. SECTION 9. All orders and judgments of said county

court may be reviewed by the supreme court in the same manner and with like effect that judgments and orders of the circuit court may be reviewed; and the supreme court shall have the same power and jurisdiction over such actions, proceedings, orders and judgments as it has over actions, proceedings, orders and judgments in the circuit court of said county, and the parties shall have the same rights to writs of error and appeal from said county court to the supreme court of this state as now, or may hereafter be, allowed by law from circuit courts of this state and may demand and shall be entitled to receive from the judge of said county court a bill of exceptions or case and have the same settled in the same manner and under the same restrictions as in the circuit court and the same shall be heard and settled within the same time as now required or may hereafter be required in the circuit court, by law or the rules and practice of said circuit court or of the said county court relative thereto.

Circuit court procedure unless inapplicable. SECTION 28. The general provisions of the statutes of Wisconsin, and all the general laws which may at any time be in force relative to circuit courts, and actions and proceedings therein, in civil and criminal cases, shall apply also to said county court, unless inapplicable, and except as otherwise provided in this act; and the rules of practice prescribed or which may hereafter be prescribed by the justices of the Supreme Court for circuit court, shall, unless inapplicable, be in force in said county court, and the judge of said county court shall have power to punish for contempt in the same manner that the judges of circuit courts are or may be authorized by law to punish for contempts; and said

county court shall have power to make and enforce such other rules of practice as may be necessary.

Approved June 18, 1907.

(In effect July 1, 1907.)

(Other sections of the Act are omitted as not pertinent.)

APPENDIX II

279 N. W. 685, 228 Wis. 519

Ernest Newton Kalb v. Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein, and George O'Brien.

No. 105

Supreme Court of Wisconsin

May 17, 1938.

1. Courts 97(5)

The claims for relief under the Frasier-Lemke Act present questions arising under the laws of the United States upon which determination of federal courts is controlling. Bankr. Act, Sec. 75(n), as amended, 11 U.S. C.A. Sec. 203(n).

2. Bankruptcy 213

The state court had jurisdiction to proceed to confirm foreclosure sale and execute judgment of foreclosure even though farm debtor's petition under Frasier-Lemke Act was pending, where there was no stay of proceedings granted, since the stay of proceedings provided by the Frasier-Lemke Act is a "judicial stay" not a "statutory stay" and requires application to state or federal

court in which foreclosure proceedings are pending for a stay. Bankr. Act, Sec. 75(n), as amended, 11 U.S. C.A., Sec. 203(n).

3. Assault and Battery 10

The acts of a sheriff in putting mortgage foreclosure purchaser in possession of the premises and executing writ of assistance did not constitute an "assault and battery" where the sheriff used no more force than was reasonably necessary, on ground that sheriff's acts were without warrant in law because of stay provided by Frasier-Lemke Act under which the mortgagor had applied for relief, where there was no stay of proceedings granted, the stay provided for in the act not being self executing. Bankr. Act, Sec. 75(n), as amended, 11 U.S.C.A. Sec. 203(n).

Appeal from an order of the Circuit Court for Walworth County; Edgar V. Werner, Judge.

Affirmed in part; reversed in part.

This action was commenced on September 1, 1937, by Ernest Newton Kalb, plaintiff, against Roscoe R. Luce, county judge for Walworth County, Henry Feuerstein, Helen Feuerstein, and George O'Brien, sheriff, charging the defendants with conspiracy, assault and battery, and false imprisonment. There was a demurrer to the complaint and from an order sustaining the demurrer entered December 23, 1937, the plaintiff appeals. All of the parties to the action reside in Walworth county.

Prior to March 7, 1933, the plaintiff and his wife had executed and delivered to the defendants Feuerstein a mortgage to secure an indebtedness. Proceedings

were begun and a judgment of foreclosure was entered on April 21, 1933. On October 2, 1934, the plaintiff filed a petition under the Frasier-Lemke Act, Bankr. Act, Sec. 75(s), 11 U.S.C.A., Sec. 203(s). No stay of proceedings was granted either in the state or the federal court. On June 27, 1935, the plaintiff's petition was dismissed by the federal court. The Feuersteins then proceeded in the state court and a sheriff's sale was held July 20, 1935. A sheriff's deed was delivered to the purchaser August 2, 1935, and the sheriff's sale on due notice was confirmed September 16, 1935.

On August 28, 1935, Congress passed the second Frasier-Lemke Act, Bankr. Act, Sec. 75, as amended, 11 U.S.C.A., Sec. 203. On September 6, 1935, plaintiff's petition in the bankruptcy court was reinstated and the order of June 27, 1935, vacated. No stay of the foreclosure proceeding was entered or applied for in either the state or the federal court.

Upon the petition of the plaintiffs in the foreclosure action on December 16, 1935, a writ of assistance fair on its face was delivered to the defendant George O'Brien, as sheriff. On March 12, 1936, the sheriff ejected the plaintiff from the mortgaged premises.

For his first cause of action the plaintiff charges the defendants with conspiring and colluding together to acquire possession of his farm and seeks to recover damages for being deprived of the use thereof in the sum of $7,000.

The second cause of action charges the defendant George O'Brien with assaulting and beating the plaintiff pursuant to the direction of the other defendants. The third cause of action charges the defendants with

false imprisonment and seeks to recover damages therefor.

The demurrer to the complaint was on two grounds: (1st) On the grounds that it stated no cause of action against the defendants; and (2nd) that several causes of action were improperly joined. The court sustained the demurrer as to the first and third causes of action as to all of the defendants; as to the second cause of action it sustained the demurrer as to Luce and the defendants Feuerstein but held that it stated a good cause of action against the defendant O'Brien for assault and battery and the defendant O'Brien was given 20 days in which to plead.

J. J. McManamy, of Madison, for appellant.

Thorson & Seymour, of Elkhorn, and Moran & O'Brien, of Delavan, for respondents.

ROSENBERRY, Chief Justice.

Upon this appeal the plaintiff contends that on and after September 6, 1935, when plaintiff's petition in the bankruptcy court was reinstated, the county court for Walworth county was wholly without jurisdiction to proceed to confirm the sale held August 2, 1935, and to execute the judgment of foreclosure. Plaintiff's contention arises under the amendment to Section 75 of the Bankruptcy Act enacted by Congress August 28, 1935, 11 U.S.C.A., Sec. 203(n), which is printed in the margin.

(1) It is the contention of the plaintiff that this statute is self-executing—that is, that it requires no application to the state or federal court in which foreclosure proceedings are pending for a stay; in other words, that it provides for a statutory and not for a judicial stay. Plaintiff's claims under the Bankruptcy

Act present a question which clearly arises under the laws of the United States and therefore present a federal question upon which determination of the federal courts is controlling.

(2) It has been held by the Circuit Court of Appeals for the Ninth Circuit, *Hardt v. Kirkpatrick,* 1937, 91 F. 2d 875, that a stay provided for by Section 75(o) and Section 75(s), as amended, 11 U.S.C.A. Section 203(o,s), is a judicial stay and not a statutory stay. While the plaintiff in this action claims his rights under Section 75(n) the same reasoning applied in the *Hardt Case* leads to the same conclusion in this case. Under the amendment to Section 75 of the Bankruptcy Act, 11 U.S.C.A., Sec. 203, the federal courts have consistently conformed to this conclusion. See cases cited 11 U.S.C.A. p. 1004, under title "Foreclosure of mortgage." See *In re Arend,* D. C., Mich., 1934, 8 F. Supp. 211. The Circuit Court of Appeals, Seventh Circuit, held in *Re Lowmon, La Fayette Life Ins. Co. v. Lowmon,* 1935, 79 F. 2d 887, that the Bankruptcy Act could not be so construed as to extend the period of redemption which had expired according to the provisions of a state statute and if so construed it would be unconstitutional.

(3) The defendant O'Brien seeks a review of that part of the order which holds that a cause of action for assault and battery is stated as to him. There is no allegation in the second cause of action that the defendant O'Brien used any excessive force or that he used more force than was reasonably necessary to put the defendants Feuerstein in possession of the mortgaged premises and to execute the writ of assistance. It is claimed

that the acts of O'Brien were wrongful because without warrant in law. This contention is based upon the same grounds upon which the other contentions were made—that is, that the court was wholly without jurisdiction to confirm the sale or to issue the writ of assistance. If as we hold the writ of assistance was validly issued then the allegations contained in the second contention with respect to assault and battery are insufficient.

Upon the appeal of the plaintiff that part of the order appealed from is affirmed. Upon motion to review of the defendant O'Brien, so much of the order as overrules the demurrer as to the second cause of action is reversed and cause remanded for further proceedings according to law.

APPENDIX III

280 N.W. 725, 228 Wis. 523

Ernest Newton Kalb v. Roscoe R. Luce, Henry Feuerstein, Helen Feuerstein, and George O'Brien.

No. 105

Supreme Court of Wisconsin

June 29, 1938.

1. Bankruptcy 213.

Where state court confirmed foreclosure sale and execution judgment when farm debtor's petition under Bankruptcy Act was pending in federal court, stay of proceedings was granted in neither state nor federal court, no appeal was taken, and purchaser at foreclosure was put in possession, debtor could not claim that state court's

order was void. Bankr. Act, Sec. 75, as amended, 11 U.S.C.A., Sec. 203.

2. Bankruptcy 217

The Bankruptcy Act providing for stay of proceedings in cases where an insolvent farmer files petition for extension of time in which to pay debts does not provide for a statutory stay, but creates rights which when properly asserted are grounds for a judicial stay. Bankr. Act, Sec. 75, as amended, 11 U.S.C.A., Sec. 203.

Appeal from an order of the Circuit Court for Walworth County; Edgar V. Werner, Judge.

On motion for rehearing.

Motion denied.

For prior opinion, see 279 N.W. 685.

J. J. McManamy, of Madison, for appellant.

Thorson & Seymour, of Elkhorn, and Moran & O'Brien, of Delavan, for respondents.

ROSENBERRY, Chief Justice.

On motion for rehearing. The appellant has moved for a rehearing upon the authority of *James M. Wright, Petitioner v. Union Central Life Insurance Company*, 58 S. Ct. 1025, 82 L. Ed.—, decided May 21, 1938. That case does not deal with and so far as we can see, has no bearing upon the question involved in this case and in the companion case. It holds the provisions considered constitutional. The plaintiff proceeds upon the theory that the order of the county court for Walworth County confirming the sale was without jurisdiction because after the plaintiff in this action had filed his petition under Section 75 of the Bankruptcy Act, as amended on Au-

gust 28, 1935, 11 U.S.C.A., Sec. 203, the state court was without jurisdiction to proceed. There was no motion for a stay either in the federal court or in the state court, the plaintiff's theory being that the filing of the petition divested the state court of all jurisdiction to proceed in the action then pending before it.

It is considered that plaintiff's position is not well taken. It may be conceded that the filing of the petition in the federal court created certain rights which the plaintiff in this action might have asserted either in the federal court or in the state court. However, the plaintiff failed to assert such rights either in the federal or state court as has already been stated. All that this court is called upon to do is to determine whether or not the order of confirmation was valid and that depends upon whether the county court for Walworth County had jurisdiction to make the determination. If it should be held that the mere filing of the petition divested the state court of jurisdiction the whole matter would be thrown into inextricable confusion. No one would know whether a judgment of foreclosure of a state court with an order confirming a sale thereunder was valid or void until a search had been made of the records of the federal courts.

(1) We need not consider nor discuss the question whether the congress has power to divest the jurisdiction of a state court which has once attached. That question is not presented by this record. It would seem from a consideration of Sec. 75 as amended, 11 U.S.C.A., Sec. 203, that the filing of the petition automatically operated to extend the period of redemption. It is possible that that state of facts if made to appear would make the order of the trial court erroneous but the order would be within the power of the court to make. No

appeal having been taken, no showing having been made in the state court, an order of sale having been confirmed and the purchaser put in possession, the plaintiff is in no position to claim that the order of the circuit court is void.

(2) We adhere to our former determination that the provisions of Sec. 75 were not intended to provide for a statutory stay but to create rights when properly asserted are grounds for a judicial stay.

Nor do we find anything in the case of *Adair v. Bank of America National Trust & Savings Association*, 58 S. Ct. 594, 82 L. Ed.—, decided February 28, 1938, to the contrary. While it is stated in that opinion that Sec. 75 provides that the filing of the petition shall effect a stay, the cases cited in support of the proposition are cases relating to the power of a court of bankruptcy to stay proceedings and it is held that courts of bankruptcy have that power. The court said: "In order to operate and protect the property during the stay, and pending confirmation or other disposition of the composition or extension proposal, the statute provides in subsections (e) and (n) (11 U.S.C.A., Sec. 203 (e, n)) for the exercise by the court of such control over the property of the farmer as the court deems in the best interests of the farmer and his creditors. These provisions look toward the maintenance of the farm as a going concern, and afford clear authority, in a proper case, for the continuance of the operations of the farm after the filing of a petition under Section 75 of the Bankruptcy Act."

See *Wright v. Vinton Branch*, 1937, 300 U.S. 440, at page 466, 57 S. Ct. 556 at page 563, 81 L. Ed. 736, 112 A.L.R. 1455.

Motion denied without costs.